

Dr. Michael Potter 01/09/2018

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| <p>1 POTTER</p> <p>2 environments, but residential settings would</p> <p>3 be the main target.</p> <p>4 Q. There was an October 25, 2017</p> <p>5 e-mail from Jen Hostetler to you that was</p> <p>6 redacted. Do you know why it was redacted?</p> <p>7 A. No. I know who Jen Hostetler</p> <p>8 -- well, she's I believe an i2L employee that</p> <p>9 works off site in Florida, but I do not.</p> <p>10 (Exhibit 4, Documents, marked</p> <p>11 for Identification.)</p> <p>12 Q. Let me show you what we marked</p> <p>13 as Exhibit number 4. Exhibit 4 is a group</p> <p>14 exhibit. The first page of it is the fee</p> <p>15 structure agreement between Bursor &amp; Fisher</p> <p>16 and yourself and then there are invoices, I</p> <p>17 believe your invoices for the work you have</p> <p>18 done in this case; is that correct?</p> <p>19 A. Correct.</p> <p>20 Q. The first page of Exhibit 4</p> <p>21 it's at least dated signed by Mr. Kopel on</p> <p>22 November 7, 2016, do you see that?</p> <p>23 A. Correct.</p> <p>24 Q. Is that about the time where</p> <p>25 you believe you were first contacted</p> <p style="text-align: right;">137</p> | <p>1 POTTER</p> <p>2 which are part of Exhibit 4?</p> <p>3 A. I keep daily time sheets in</p> <p>4 constructing this, the invoices and</p> <p>5 handwritten notes of amount of time spent</p> <p>6 talking on the phone with counsel, amount of</p> <p>7 time reviewing documents and then I summarize</p> <p>8 all that and I put it into this, but I don't</p> <p>9 keep those handwritten daily records.</p> <p>10 Q. Those are thrown away?</p> <p>11 A. Correct.</p> <p>12 Q. If you look at the first</p> <p>13 invoice I have in Exhibit 4 it's dated August</p> <p>14 17, 2017, do you see that?</p> <p>15 A. Yes.</p> <p>16 Q. I take it that whatever work is</p> <p>17 done within this invoice was done prior to</p> <p>18 August 17, 2017, correct?</p> <p>19 A. Correct.</p> <p>20 Q. I note there are some dates</p> <p>21 with respect to telephone conversations where</p> <p>22 you have dates on there, right?</p> <p>23 A. Excuse me, I'm just looking at</p> <p>24 the notation here of under consultation;</p> <p>25 further analysis, compilation and mailing of</p> <p style="text-align: right;">139</p> |
| <p>1 POTTER</p> <p>2 concerning this case?</p> <p>3 A. Seems about right.</p> <p>4 Q. Is this first page -- this is</p> <p>5 your fee structure agreement, correct?</p> <p>6 A. Correct.</p> <p>7 Q. So you would have provided this</p> <p>8 to Mr. Kopel to sign, correct?</p> <p>9 A. Correct, yeah, I e-mailed it to</p> <p>10 him and at some point I assume it took him a</p> <p>11 while to decide whether they wanted to retain</p> <p>12 me, but that's the date they signed it.</p> <p>13 Q. I just want to go over the</p> <p>14 invoices. I have as part of Exhibit 4 four</p> <p>15 invoices for your work in this case, correct?</p> <p>16 A. Correct.</p> <p>17 Q. Are there any other invoices</p> <p>18 you submitted as of today other than the four</p> <p>19 invoices that make up part of Exhibit 4?</p> <p>20 A. I believe I submitted an</p> <p>21 invoice associated with the writing of the</p> <p>22 rebuttal report I don't know in the last week</p> <p>23 or so.</p> <p>24 Q. Did you keep any time sheets</p> <p>25 other than what's indicated in these invoices</p> <p style="text-align: right;">138</p>                                 | <p>1 POTTER</p> <p>2 scientific literature so there may have been</p> <p>3 an invoice prior to this if these are in time</p> <p>4 sequence.</p> <p>5 Q. Okay.</p> <p>6 A. That's typically what I say if</p> <p>7 I'm continuing on a project.</p> <p>8 Q. So if there was a prior</p> <p>9 invoice, the work that you have on this first</p> <p>10 August 17, 2017 invoice would have been your</p> <p>11 work from when you issued the prior invoice</p> <p>12 to whatever date is on this current invoice;</p> <p>13 is that how you would usually do it?</p> <p>14 A. Correct.</p> <p>15 Q. The next invoice in this</p> <p>16 exhibit is dated October 8, 2017, do you see</p> <p>17 that?</p> <p>18 A. Yes.</p> <p>19 Q. I'm assuming and am I correct</p> <p>20 then that the work that's shown in this</p> <p>21 invoice would have been done by you after</p> <p>22 August 17, 2017 up to October 8, 2017,</p> <p>23 correct?</p> <p>24 A. Correct.</p> <p>25 Q. The third invoice within</p> <p style="text-align: right;">140</p>  |



1 POTTER  
2 Exhibit 4 is dated November 3, 2017, correct?  
3 A. Correct.  
4 Q. I take it that the work that's  
5 shown here would have been done from the time  
6 period of October 8, 2017 up to November 3,  
7 2017, correct?  
8 A. Correct.  
9 Q. And the last -- oh, I'm sorry,  
10 this wouldn't be -- this is out of place a  
11 little bit. This invoice the last one is  
12 actually dated November 30, 2016, do you see  
13 that?  
14 A. Correct.  
15 Q. Do you believe this November  
16 30, 2016 was your first invoice?  
17 A. No, see this is November 30,  
18 2016. This was the first invoice.  
19 Q. That's what I just said.  
20 A. I'm sorry, I'm looking at it in  
21 chronological order here and it does look  
22 like the first invoice, yeah, because it has  
23 less the retainer.  
24 Q. The testing that was done by  
25 Sierra Labs, does that indicate that the mice

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1 POTTER  
2 will remain where food and shelter is ample  
3 even though a repeller is present?  
4 A. No. The data didn't  
5 demonstrate that because in the untreated  
6 controls even though the food and -- the food  
7 and the water being the big difference were  
8 only in the front, but in the untreated  
9 controls they were evenly distributed between  
10 the front and back so I think it just further  
11 shows that mice are constantly moving around,  
12 probably the most crucial resource being the  
13 place to be that's safe.  
14 Q. I want to go over your first  
15 report Exhibit number 1 dated October 31,  
16 2017.  
17 A. Okay.  
18 Q. Exhibit number 1, I'm actually  
19 on page 1 of the exhibit where it starts at  
20 the top introduction. You did number your  
21 paragraphs?  
22 A. Correct.  
23 Q. Paragraph number 2, that has  
24 your conclusion with respect to this report  
25 that you conclude that the devices are

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1 POTTER  
2 ineffective for their stated purposes and can  
3 neither repel nor drive out any of these  
4 critters; did I read that correctly?  
5 A. Correct.  
6 Q. You did Roman VI Overview of  
7 Ultrasonic and Electromagnetic Technology  
8 where essentially you go through other  
9 publications or articles and make citations?  
10 A. Correct.  
11 Q. I take it whatever you included  
12 within this section you found in these  
13 articles and citations?  
14 A. Yes. I have to read all this  
15 to make sure -- there may have been things I  
16 say here, but basically yeah, this is sort of  
17 a summation of some of the literature that's  
18 out there.  
19 Q. None of these publications that  
20 you cite to actually tested the Bell & Howell  
21 devices, correct?  
22 A. Correct.  
23 Q. In some of these tests done by  
24 these other folks that you have cited to,  
25 they included other pests beyond roaches,

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1 POTTER  
2 ants, spiders and mice, correct?  
3 A. Some of them involve rats. The  
4 bulk of these studies were designed for  
5 roaches, ants, spiders and rodents. There  
6 may have been a review article that sort of  
7 capsuled other nuisance wild life as well,  
8 the Bomford article and I believe one of the  
9 Koehler articles may have, but when we get to  
10 the ones that I specifically talk about the  
11 devices which I think is later in this  
12 document, those were exclusively on those.  
13 Q. You discuss within this  
14 subsection Roman numeral VI electromagnetic  
15 devices, correct?  
16 A. Correct.  
17 Q. If the devices here at issue do  
18 not involve electromagnetic sound waves, you  
19 will agree with me that what you listed here  
20 for electromagnetic devices is not relevant?  
21 MR. KOPEL: Objection,  
22 misstates the record.  
23 A. The reason I included the  
24 electromagnetic technology, a review of the  
25 literature on that was because at least one

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| <p>1 POTTER</p> <p>2 of the pest repellent devices of Bell &amp;</p> <p>3 Howell includes a combination of</p> <p>4 electromagnetic and ultrasonic. In fact,</p> <p>5 that was one of the devices that we evaluated</p> <p>6 with Mr. Mankin initially in trying to make a</p> <p>7 determination of which device we would</p> <p>8 evaluate in the subsequent insect and rodent</p> <p>9 studies.</p> <p>10 Q. Have you tried to obtain the</p> <p>11 actual devices that were tested by any of</p> <p>12 these other authors of these publications to</p> <p>13 actually compare them with the Bell &amp; Howell</p> <p>14 device?</p> <p>15 A. No, but I of course read the</p> <p>16 studies and many of the studies included</p> <p>17 specific physical characteristics of these</p> <p>18 other manufacturer's devices and respective</p> <p>19 frequency and amplitude and cycles and</p> <p>20 variable output.</p> <p>21 Q. If the decibel level of the</p> <p>22 devices that were tested in these articles is</p> <p>23 below 70, would then the results be</p> <p>24 irrelevant to your opinions with respect to</p> <p>25 the Bell &amp; Howell devices?</p> <p style="text-align: right;">145</p> | <p>1 POTTER</p> <p>2 so certainly some of those could have been</p> <p>3 intended for those uses.</p> <p>4 Q. Would you agree with me that</p> <p>5 testing done to devices that are not the Bell</p> <p>6 &amp; Howell devices in a rural setting would not</p> <p>7 be relevant to determine the effectiveness of</p> <p>8 the Bell &amp; Howell devices?</p> <p>9 A. No, I would not agree with</p> <p>10 that.</p> <p>11 Q. Would you agree with me that</p> <p>12 devices that had decibel levels below 60</p> <p>13 would not be relevant in determining whether</p> <p>14 the Bell &amp; Howell devices are effective?</p> <p>15 A. As stated previously, it would</p> <p>16 depend on the facts of how those measurements</p> <p>17 were taken and at what distance from the</p> <p>18 transducer.</p> <p>19 Q. Have you done any study to</p> <p>20 account for the distance in which the devices</p> <p>21 were measured in all of these publications</p> <p>22 that you cite to?</p> <p>23 A. Could you repeat the question?</p> <p>24 MR. OSTOJIC: Could you repeat</p> <p>25 it.</p> <p style="text-align: right;">147</p>                  |
| <p>1 POTTER</p> <p>2 A. No, not necessarily.</p> <p>3 Q. So the decibel level of the</p> <p>4 Bell &amp; Howell devices was between 87 and 99</p> <p>5 decibels, right?</p> <p>6 A. At a specific distance from the</p> <p>7 transducer which I -- I would have to go back</p> <p>8 to the documents to see what that was, but it</p> <p>9 was relatively close whereas in some of these</p> <p>10 experiments those distances were either</p> <p>11 further away or evaluated at varying</p> <p>12 distances away so you have to be careful to</p> <p>13 compare apples to apples in terms of distance</p> <p>14 from a device.</p> <p>15 Q. Were any of the devices that</p> <p>16 were tested in these publications that you</p> <p>17 cite to, were they intended for rural</p> <p>18 settings?</p> <p>19 A. Could you repeat the question?</p> <p>20 Q. Were the devices that were</p> <p>21 tested by some of these authors that you cite</p> <p>22 to in Exhibit 1, were they intended to be</p> <p>23 used in a rural setting?</p> <p>24 A. Some of the rodent evaluations</p> <p>25 were conducted in non-residential buildings</p> <p style="text-align: right;">146</p>                               | <p>1 POTTER</p> <p>2 (Record read.)</p> <p>3 A. I have read these articles</p> <p>4 thoroughly and many of them do specify the</p> <p>5 distance from the device that the sound</p> <p>6 measurements were taken, but I would have to</p> <p>7 go back to each article and produce those</p> <p>8 because I can't recall them all.</p> <p>9 Q. You mention that devices can be</p> <p>10 different based on their decibel level and</p> <p>11 the frequency used, correct?</p> <p>12 A. Correct.</p> <p>13 Q. Are there any other variables</p> <p>14 that can distinguish ultrasonic pest</p> <p>15 repellers from one another?</p> <p>16 A. The other variable is the</p> <p>17 variability of the output, the cycling or the</p> <p>18 intervals between the sound waves so</p> <p>19 generally many of the devices that are on the</p> <p>20 market now or even that were tested at that</p> <p>21 time had a variable output which was probably</p> <p>22 intended to reduce the likelihood of</p> <p>23 habituation by the animals particularly</p> <p>24 rodents.</p> <p>25 Q. What about the number of</p> <p style="text-align: right;">148</p> |



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1 **POTTER**  
2 **speakers within a device, does that**  
3 **distinguish the various devices?**  
4 A. It shouldn't. The sound output  
5 in terms of frequency and amplitude and the  
6 variation of that sound should be the driver  
7 of the performance of the device. It's much  
8 like I have a big old Gateway computer at  
9 home that's much larger than my current  
10 computer, but the current one is much more  
11 powerful so you have to look at the physics  
12 of the device and what the output is, not the  
13 number of speakers. Without knowing those  
14 characteristics, it's really immaterial to  
15 me.  
16 Q. You have not actually tested  
17 those devices with the Bell & Howell device,  
18 any of the devices of these publications that  
19 you cite to, correct?  
20 MR. KOPEL: Objection to form.  
21 A. Are you asking have I compared  
22 those devices and studies with the Bell &  
23 Howell? I don't understand.  
24 Q. Have you purchased or obtained  
25 any of the devices that were tested by these

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1 **POTTER**  
2 **authors that you cite to in your report?**  
3 A. NO.  
4 Q. You have done no testing to  
5 actually determine how similar or how  
6 different the Bell & Howell devices are to  
7 any of the devices that are cited in the  
8 publications that you've included in your  
9 report, fair?  
10 A. Not exactly. When you say  
11 testing, I interpret that as being have I  
12 reviewed the published studies on these  
13 devices and their physical characteristics  
14 that were measured by these authors which are  
15 all summarized in my report and what I found  
16 was that those physical output  
17 characteristics were very similar to the  
18 physical characteristics of frequency and  
19 amplitude and variability to the Bell &  
20 Howell devices so it seems very appropriate  
21 to make comparisons between those devices.  
22 whether the device had purple  
23 plastic casing or had two speakers or one, I  
24 mean the physical characteristics or the  
25 output of the device is what's important so

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1 **POTTER**  
2 no, I didn't test those specifically, but I  
3 think we can bridge the information from  
4 those studies to the Bell & Howell study  
5 although again we wanted to conduct studies  
6 on the Bell & Howell devices as well which is  
7 what we did.  
8 Q. So you don't believe that the  
9 quality of manufacturer or the materials used  
10 in devices is important in determining  
11 whether devices are similar or different,  
12 fair?  
13 A. What's important is measuring  
14 the physical characteristics of the devices.  
15 Ultrasound is ultrasound from the standpoint  
16 of if you know the frequency and the  
17 amplitude and the variability of the sound  
18 waves, that's what's important, not who made  
19 it or what the container looked like or if it  
20 had one outlet or night light on it.  
21 Q. You believe ultrasound is  
22 ultrasound and it doesn't then matter what  
23 the device is, how it was made, how many  
24 speakers are in there, it essentially all  
25 works the same; is that fair?

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1 **POTTER**  
2 A. When I said ultrasound is  
3 ultrasound, I meant that if you know the  
4 output characteristics, the physical  
5 properties of the device, that's what's  
6 important. The physics of ultrasound is a  
7 constant. The manufacture and the packaging  
8 of the product being sold is largely  
9 immaterial.  
10 Q. Why didn't you include any of  
11 these publications except for two in your  
12 file?  
13 MR. KOPEL: Objection, asked  
14 and answered.  
15 A. All of these publications that  
16 are cited in my report are cited in the  
17 reference citations and as I said earlier,  
18 they are all readily available through online  
19 searching for these publications so they were  
20 provided to counsel.  
21 Q. So your counsel Mr. Kopel has  
22 all of these publications that you know of so  
23 you provided it to counsel?  
24 MR. KOPEL: Objection, don't  
25 answer that question.

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| <p>1 POTTER</p> <p>2 Q. You just answered. You said</p> <p>3 that you provided it to counsel. I want to</p> <p>4 make sure that's what you said?</p> <p>5 MR. KOPEL: Don't answer that</p> <p>6 question.</p> <p>7 Q. Are you not going to answer the</p> <p>8 question?</p> <p>9 A. I have been instructed by</p> <p>10 counsel not to answer it so I guess I ought</p> <p>11 not to answer it.</p> <p>12 Q. Have you tried to contact any</p> <p>13 of the authors of these publications about</p> <p>14 their testing?</p> <p>15 MR. KOPEL: Objection, asked</p> <p>16 and answered.</p> <p>17 A. I have not tried to contact any</p> <p>18 of these authors. I take that back. One</p> <p>19 author Richard Mankin who helped us with the</p> <p>20 quantification of the sound output of the</p> <p>21 devices, I did read his publication. I can't</p> <p>22 recall whether it was prior or after speaking</p> <p>23 with him. I think it was prior. I read it</p> <p>24 before I spoke with him.</p> <p>25 Q. I'm going to jump to in Exhibit</p> <p style="text-align: right;">153</p>  | <p>1 POTTER</p> <p>2 common indoor cockroach in residential</p> <p>3 settings. Odorous house ants as I talked</p> <p>4 about and cellar spiders are certainly one of</p> <p>5 the very top most common spiders in dwellings</p> <p>6 that people would purchase these devices to</p> <p>7 try to get rid of.</p> <p>8 Q. Is it fair to say that you are</p> <p>9 reporting on the testing that was done by i2L</p> <p>10 and Sierra Research was essentially what you</p> <p>11 took from their reports to you and either</p> <p>12 summarized or paraphrased their testing as</p> <p>13 well as their findings; is that fair?</p> <p>14 A. Not in my mind because I had a</p> <p>15 lot of input in designing these protocols.</p> <p>16 The Intertek protocol I pretty much designed</p> <p>17 myself. The rodent protocol was done in</p> <p>18 collaboration as I said with Dr. Corrigan and</p> <p>19 Dr. Donohue and there was discussion back and</p> <p>20 forth in the actual set up and conduct of the</p> <p>21 experiments. We talked many times back and</p> <p>22 forth, but then of course at some point I was</p> <p>23 not there to take the counts so the actual</p> <p>24 data collection was by these two companies.</p> <p>25 Q. For the cockroach test, there</p> <p style="text-align: right;">155</p> |
| <p>1 POTTER</p> <p>2 1 your Roman numeral VIII, the testing of the</p> <p>3 Bell &amp; Howell devices. How many different</p> <p>4 species of cockroaches are there?</p> <p>5 A. Thousands, probably about 6,500</p> <p>6 if you want a number.</p> <p>7 Q. Why did you choose or why did</p> <p>8 i2L choose the odorous house ants for the</p> <p>9 testing?</p> <p>10 A. That was my decision. Odorous</p> <p>11 house ant is one of the most common indoor</p> <p>12 ants in the United States. It's also one</p> <p>13 that is readily easy to acquire for testing</p> <p>14 and it seemed like all three of these pests,</p> <p>15 the German cockroach, odorous house ant and</p> <p>16 cellar spider, by the way, that's an error</p> <p>17 that was transcribed from an earlier -- that</p> <p>18 scientific name of the cellar spider is</p> <p>19 incorrect, that's house spider, but bottom</p> <p>20 line is all three of these species were</p> <p>21 selected by me specifically because they</p> <p>22 represent very common pests in dwellings that</p> <p>23 a purchaser of this device would need to have</p> <p>24 this device work on if they had these</p> <p>25 problems. German cockroach by far the most</p> <p style="text-align: right;">154</p> | <p>1 POTTER</p> <p>2 were two sides, one had a repeller in it and</p> <p>3 one did not, correct?</p> <p>4 A. Correct.</p> <p>5 Q. There was dog food placed on</p> <p>6 both sides?</p> <p>7 A. Correct.</p> <p>8 Q. Would it be a flaw in the</p> <p>9 testing if the two sides were not identical?</p> <p>10 A. Well, not in the way that we</p> <p>11 conducted this experiment and the results we</p> <p>12 achieved and I will try to explain. In the</p> <p>13 cockroach experiment we had food and</p> <p>14 harborage on both sides. We released the</p> <p>15 cockroaches initially only on the side with</p> <p>16 the repeller. Again, the reason for doing</p> <p>17 that was much like in the rodent study, we</p> <p>18 wanted to simulate as close as we could in a</p> <p>19 laboratory experiment more of a realistic</p> <p>20 situation where you had existing a presence</p> <p>21 of cockroaches in a harborage, cockroaches of</p> <p>22 course aggregate, they defecate, they have</p> <p>23 pheromones so when you are trying to</p> <p>24 eradicate cockroaches in a dwelling with one</p> <p>25 of these devices, you will have an</p> <p style="text-align: right;">156</p>  |





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1 POTTER  
2 established infestation with cockroaches  
3 living in these protected locations.  
4 Q. By providing a harborage for  
5 the cockroaches, aren't you really testing  
6 whether the Bell & Howell device will drive  
7 cockroaches out that may be behind walls or  
8 under floors?  
9 A. We are trying to test this  
10 device in the real world. All of these pests  
11 are cryptic. They live in cracks and  
12 crevices and voids between floors, behind  
13 walls, within appliances and there is no way  
14 to drive these pests out of their established  
15 locations without having a harborage. Could  
16 you gain meaningful information initially by  
17 not including harborages in your experiments  
18 as were some of the studies peer reviewed  
19 work done previously, yes, but we had one  
20 shot with these studies to try to simulate  
21 what effect they would have in the hands of  
22 the consumer which is why we devised the  
23 experiments the way we did.  
24 Q. Why do you say you had only one  
25 shot?

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1 POTTER  
2 A. Well, because of the court  
3 imposed time line of production of evidence  
4 in the case I was instructed what our time  
5 line was.  
6 MR. KOPEL: Stop. Don't reveal  
7 any communications between me and you.  
8 Q. Would you have wanted to do  
9 testing of the Bell & Howell devices without  
10 providing a harborage for the pests?  
11 A. No.  
12 Q. Is there anywhere in the Bell &  
13 Howell instructions that you recall seeing  
14 where it says it will repel pests that are  
15 located behind walls or under floors?  
16 MR. KOPEL: Could you repeat  
17 the question.  
18 (Record read.)  
19 A. May I look at a copy of the  
20 Bell & Howell label?  
21 Q. Is this what you are looking  
22 for?  
23 A. For starters, yes. Could you  
24 repeat the question one more time.  
25 (Record read.)

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1 POTTER  
2 A. No.  
3 Q. By providing a harborage to the  
4 pests, aren't you essentially testing whether  
5 the Bell & Howell devices would repel or  
6 drive pests out that are maybe located behind  
7 walls or under floors; isn't that really what  
8 the testing is doing?  
9 MR. KOPEL: Objection, asked  
10 and answered.  
11 A. No, certainly if there was a  
12 mouse harboring in a garage underneath a lot  
13 of clutter and we put one of these things in  
14 the living room, that would be an extreme  
15 evaluation of this device, but by putting  
16 these devices in these insect experiments  
17 literally within three feet of the harborage  
18 directed point blank at the harborage, these  
19 roaches are not sitting in this device for  
20 the entire experiment. Roaches on average  
21 feed once a day at least based on research  
22 done by Dr. Don Cochran, Dr. Jewel Silverman.  
23 In other words, ants are  
24 constantly foraging throughout the day so  
25 it's a misnomer if there's any impression

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1 POTTER  
2 that these roaches resided inside these  
3 harborages for the entire experiments. They  
4 did not. They just didn't move to the other  
5 side of the arena.  
6 Q. I take it you know from Dr.  
7 Mankin's testing that cardboard harborages  
8 will decrease the effectiveness of the Bell &  
9 Howell devices, correct?  
10 A. Correct.  
11 Q. So isn't it true that if the  
12 pests remain inside the harborage, that they  
13 are essentially being shielded from the  
14 effectiveness of the Bell & Howell devices,  
15 correct?  
16 A. If they stayed in the harborage  
17 ad infinitum which they do not. I think in  
18 the ant study I think in my report I showed  
19 some pictures of ants that were foraging in  
20 the report, but basically I have pictures  
21 showing that the ants were foraging in the  
22 arena, they were going for sugar so how else  
23 does one drive these pests out of the  
24 location? That was what we were trying to  
25 evaluate.

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| <p>1 POTTER</p> <p>2 Q. You will agree with me that</p> <p>3 cockroaches and ants will remain in their</p> <p>4 nest to protect the colony so long as there</p> <p>5 is food and sustenance for them, fair?</p> <p>6 A. Of course ants have nests,</p> <p>7 cockroaches tend to harbor, but they will</p> <p>8 often go back to those areas, but they will</p> <p>9 -- they sally forth to forage for resources</p> <p>10 in which case you would assume they would</p> <p>11 come in contact with these repellant</p> <p>12 materials.</p> <p>13 Q. In the tests done by i2L, the</p> <p>14 pests were provided with food and sustenance</p> <p>15 within the harborage, correct?</p> <p>16 A. Correct.</p> <p>17 Q. So you would not expect then in</p> <p>18 a real world --</p> <p>19 A. I'm sorry, I misspoke. Your</p> <p>20 question is they were provided with food and</p> <p>21 sustenance within the harborage, that's not</p> <p>22 correct. The harborage was the cardboard</p> <p>23 tube. The food and water was placed outside</p> <p>24 the harborage much as it would be if</p> <p>25 cockroaches were harboring in a crack</p> <p>161</p>  | <p>1 POTTER</p> <p>2 dead flies.</p> <p>3 Q. i2L found that one replicate of</p> <p>4 the cockroach test showed a significant</p> <p>5 effectiveness of the Bell &amp; Howell devices,</p> <p>6 correct?</p> <p>7 A. It showed a significant</p> <p>8 movement of the cockroaches to the</p> <p>9 non-repeller side in one replicate, yes.</p> <p>10 Q. That would show -- I take it</p> <p>11 that you believe if the roaches move away</p> <p>12 from the repeller, they are being repelled</p> <p>13 and its showing it's effective, correct?</p> <p>14 A. There was a significant</p> <p>15 difference in movement of the cockroaches in</p> <p>16 the cockroach study particularly in one</p> <p>17 replicate which pretty much forced it to</p> <p>18 significance of the three replicates, but we</p> <p>19 are looking at a totality of about 13 percent</p> <p>20 overall movement which it may be</p> <p>21 statistically significant, but it's</p> <p>22 biologically and commercially impractical or</p> <p>23 irrelevant in my view.</p> <p>24 Q. If you had sufficient time and</p> <p>25 resources, would you have done a test of the</p> <p>163</p>  |
| <p>1 POTTER</p> <p>2 underneath your kitchen sink and then forage</p> <p>3 to the bottom of the cabinet.</p> <p>4 Q. In performing testing of a</p> <p>5 pest, wouldn't you want to starve the pest</p> <p>6 first before conducting the test?</p> <p>7 A. Absolutely not. In fact, every</p> <p>8 published study that's been conducted at</p> <p>9 least in my literature search on both insects</p> <p>10 and rodents either provided food or certainly</p> <p>11 had no mention of starvation of those</p> <p>12 organisms prior to that.</p> <p>13 Q. Do you know if the ultrasonic</p> <p>14 waves from the Bell &amp; Howell devices could</p> <p>15 penetrate the plastic dishes that were used</p> <p>16 as harborage for the ants?</p> <p>17 A. I don't know, but again, it</p> <p>18 becomes in designing the experiment the</p> <p>19 plastic dishes were transferred so we could</p> <p>20 have an ant colony transferred into the</p> <p>21 location where the device was operating.</p> <p>22 That container had holes around the bottom of</p> <p>23 the device or the bottom of the chamber to</p> <p>24 allow the ants to freely forage out of the</p> <p>25 nesting location to the sugar water and the</p> <p>162</p> | <p>1 POTTER</p> <p>2 Bell &amp; Howell devices on pests without using</p> <p>3 harborages?</p> <p>4 A. Probably not because there is a</p> <p>5 lot of literature on that already showing</p> <p>6 that they did not work. There was some</p> <p>7 literature, not as much, but there were some</p> <p>8 studies that were done with harborage. I</p> <p>9 specifically remember Wong's study on ants</p> <p>10 was done in the presence of harborage. I</p> <p>11 think he had wood chips that the ants were</p> <p>12 nesting in and there was a second one, I</p> <p>13 think his name is Osher, I believe an</p> <p>14 Egyptian fellow, I can get you the reference,</p> <p>15 that was done on cockroaches and one of the</p> <p>16 experiments he performed had sort of a</p> <p>17 simulated kitchen cabinet within the arena,</p> <p>18 but to answer your question, the bulk of the</p> <p>19 studies in the past were done without</p> <p>20 harborage and it clearly showed the vast</p> <p>21 majority of time there was either no effect</p> <p>22 or certainly no biological effect so we</p> <p>23 wanted again to try to design experiments</p> <p>24 that were a little bit more relevant to a</p> <p>25 real world setting.</p> <p>164</p> |



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1 POTTER

2 Q. How long was the connecting

3 tube between the repeller side and the

4 untreated side for the cockroaches?

5 A. I'll have to look at the

6 experiment. I want to say about three to

7 four feet, but if you want an exact number I

8 can --

9 Q. Who determined the size of the

10 connecting tube?

11 A. I determined the size. I think

12 in the experiment we talked back and forth

13 initially that we wanted to have our arenas,

14 our paired chambers be at least 3 by 3 by 3

15 as I recall. The size of the connecting tube

16 I provided i2L with some other earlier

17 research studies and I'm assuming they

18 patterned the length of their connecting

19 tube.

20 Q. The harborage for the ants was

21 painted black with India ink, correct?

22 A. Correct.

23 Q. What was the impact of having

24 India ink used with respect to the

25 effectiveness of the Bell & Howell devices?

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1 POTTER

2 A. First of all, again, if I could

3 have a protocol to look at, I could be

4 certain of this, but from recollection the

5 lid was then removed, but again, I need to

6 see a protocol to be certain of that, but the

7 important point is we had the identical

8 harborage on both the repeller side and the

9 non-repeller side both in the treatment

10 arenas as well as in the untreated control

11 arenas so whether -- if we had no untreated

12 controls or we only had a dark harborage on

13 one side, perhaps you could ask that

14 question, but I think having included those

15 controls and replications in the presence of

16 the harborages on both sides in that

17 experiment I think that if there was an

18 effect, it would be the same effect.

19 Q. Cockroaches that left the side

20 where the repeller was and were in the

21 connecting tube, they were not counted as

22 repellent, correct?

23 A. Could you repeat the question?

24 Q. Cockroaches that had left the

25 place where you had a repeller and were

166

1 POTTER

2 inside the connecting tube, were not

3 considered as repelled, correct?

4 A. That's correct, they were --

5 MR. KOPEL: Were you done with

6 your answer?

7 THE WITNESS: No.

8 MR. KOPEL: Please finish.

9 A. They were not counted as

10 repelled. They were accounted for after the

11 experiment, but the decision was made to not

12 count them in the case of the cockroaches.

13 Our big concern was not disturbing the

14 location of the insects and the spiders in

15 the experiment.

16 In the case of the ants we did.

17 we used fiber optics to basically make those

18 counts without disturbing the ants in the

19 connective device. In the cockroaches we

20 made the decision not to and in fact in every

21 one of the other published studies on

22 cockroaches where there was a connecting

23 tube, in no case did they score those as

24 being repelled. They either scored them as a

25 separate category of just in the tube or they

167

1 POTTER

2 basically made a comment that whatever

3 insects were on the left side or the right

4 side of the chambers were in the tube.

5 Q. Was the connecting tube for

6 ants and cockroaches and the spiders PVC?

7 A. Can I have my --

8 Q. It should be in front of you.

9 MR. KOPEL: If you are at a

10 quick point I want to take a restroom

11 break whenever.

12 MR. OSTOJIC: Okay.

13 A. These are black and white.

14 Mine are in color, but it looks like a

15 cardboard tube connected. I believe in the

16 case of the ants, we used a smaller PVC tube

17 with a connecting ramp.

18 Q. The PVC tubing, you would

19 expect that the ultrasonic waves from the

20 Bell & Howell device would not be able to

21 penetrate that, fair?

22 A. Correct, but the PVC tube

23 stopped at the outer edge of the chamber so.

24 Q. There is a picture figure 5 in

25 the i2L report that shows the PVC tube --

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|   |  |
|---|--|
| <p>1 POTTER</p> <p>2 A. I beg your pardon.</p> <p>3 Q. That shows the tube probably</p> <p>4 halfway into the enclosure where the Bell &amp;</p> <p>5 Howell device was, correct?</p> <p>6 A. That's correct. I misspoke.</p> <p>7 It has a paper ramp going into the arena.</p> <p>8 Q. Who decided to use a ramp for</p> <p>9 the ants?</p> <p>10 A. In discussing the methodology</p> <p>11 for the experiment, we all agreed that it was</p> <p>12 important to have an accessible bridge to</p> <p>13 allow the insects or spiders to move back and</p> <p>14 forth. That decision was in fact I believe</p> <p>15 made by the i2L director of the study Timothy</p> <p>16 Ford. The intent was to -- ants are small so</p> <p>17 you had to have some easy way in which those</p> <p>18 ants could bridge from the lip of the PVC</p> <p>19 tube to the bottom of the plastic</p> <p>20 sub-enclosure which was inside a larger</p> <p>21 plywood chamber.</p> <p>22 Q. The Bell &amp; Howell user manual</p> <p>23 states that it's the efficiency of the</p> <p>24 product is decreased when there's carpeting</p> <p>25 in the room, do you recall that?</p> <p style="text-align: right;">169</p> | <p>1 POTTER</p> <p>2 under carpet so I don't quite understand what</p> <p>3 relevance it would have. I understand</p> <p>4 obstructions, I understand fabric, but I</p> <p>5 don't understand why that would have any</p> <p>6 relevance to these tests or well, to these</p> <p>7 tests and why it would disqualify these tests</p> <p>8 as being a reasonable experiment.</p> <p>9 Q. But if the Bell &amp; Howell</p> <p>10 instructions state that the effectiveness of</p> <p>11 its product is decreased when there's a</p> <p>12 barrier such as carpeting, why would you test</p> <p>13 the effectiveness of the product in an</p> <p>14 apartment with carpeting?</p> <p>15 A. First of all, I don't know if</p> <p>16 there was carpeting in the apartments. That</p> <p>17 would be a question that Bill Donohue would</p> <p>18 have to answer, but again, ultrasonic sound</p> <p>19 waves have tremendous directionality, high</p> <p>20 frequency, short wave lengths that are very</p> <p>21 directional so I don't know if these devices</p> <p>22 are plugged into a wall outlet that's on</p> <p>23 average 12 inches above the floor how they</p> <p>24 even would encounter a carpeted floor a foot</p> <p>25 below. They should be moving in a</p> <p style="text-align: right;">171</p> |
| <p>1 POTTER</p> <p>2 A. Correct.</p> <p>3 Q. The apartments in which testing</p> <p>4 for the mice was done, they included</p> <p>5 carpeting, didn't they?</p> <p>6 A. I'm not sure.</p> <p>7 Q. If the testing of the</p> <p>8 apartments did include carpeting, that was a</p> <p>9 flaw in the testing by Sierra, correct?</p> <p>10 A. No because Bell &amp; Howell's</p> <p>11 instructions don't specifically say don't use</p> <p>12 this device in any household that has</p> <p>13 carpeting which is most of the households in</p> <p>14 the United States.</p> <p>15 Q. But you understand that the</p> <p>16 efficiency or the effectiveness of the Bell &amp;</p> <p>17 Howell device is decreased when there's</p> <p>18 carpeting there in a room, correct?</p> <p>19 A. I have to say I don't</p> <p>20 understand that wording on the Bell &amp; Howell</p> <p>21 instructions. I understand that ultrasonic</p> <p>22 waves don't go through fabric surfaces, but</p> <p>23 when we are talking about mice, rats,</p> <p>24 cockroaches, spiders and to a large extent</p> <p>25 ants, most of these pests are not foraging</p> <p style="text-align: right;">170</p>                    | <p>1 POTTER</p> <p>2 directional fashion which is again one of the</p> <p>3 inherent limitations of these devices.</p> <p>4 Q. Is it fair to say that Bill</p> <p>5 Donohue would be in a better position to</p> <p>6 explain what exactly went on with the testing</p> <p>7 in the Modesto, California apartments?</p> <p>8 A. Certainly I was not there for</p> <p>9 the recording of the data, but we talked</p> <p>10 extensively by telephone throughout the</p> <p>11 course of the study and of course in the</p> <p>12 design of the study so I think I have a</p> <p>13 pretty good handle on what was done. There</p> <p>14 are a few questions that I would have to ask</p> <p>15 him or someone would have to ask him as to</p> <p>16 whether the apartments were carpeted, but I</p> <p>17 don't think it has a great deal of relevance</p> <p>18 in the way these devices would need to work</p> <p>19 to be effective.</p> <p>20 Q. Rodents are territorial, right?</p> <p>21 A. Certainly I would say generally</p> <p>22 rats and mice are territorial, the males more</p> <p>23 than females, but generally yeah, mice want</p> <p>24 to carve out their own areas for nesting and</p> <p>25 so forth.</p> <p style="text-align: right;">172</p>   |



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1 POTTER  
2 Q. By testing the mice in the  
3 apartments and only allowing the mice to  
4 acclimate in the room where the Bell & Howell  
5 device was located, aren't you essentially  
6 skewing the test results?  
7 A. No for reasons I said earlier  
8 that we wanted to evaluate the effect of  
9 these devices in a real world setting where  
10 you had an established infestation, we then  
11 put the devices in to see if we could drive  
12 them out of that area and again, the  
13 untreated controls clearly demonstrated that  
14 these mice were very happy to relocate to the  
15 back part of the apartment with no presence  
16 of a repeller so I don't think it made any  
17 difference where the mice were initially  
18 introduced.  
19 Q. Isn't it true that the mice are  
20 attracted to the food and water that was in  
21 the front room of the Modesto, California  
22 apartments?  
23 A. Could you repeat the question?  
24 Q. The tests that Sierra did, it  
25 didn't have food or water in the back room,

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1 POTTER  
2 right?  
3 A. Correct.  
4 Q. So the mice had essentially two  
5 choices; go into the front room where the  
6 food and water is or starve?  
7 A. Well --  
8 Q. Isn't that true though, those  
9 were the choices?  
10 A. If we had conducted the study  
11 for six months, perhaps, but first of all,  
12 mice don't starve in a short period of time  
13 and dying of thirst which I think was in one  
14 of the rebuttal reports is a little  
15 ridiculous because mice can metabolize their  
16 own water from their own bodies. They  
17 require very small amounts of water as do  
18 cockroaches and spiders and such, but no, I  
19 think what the back and forth movement showed  
20 and the presence of the mice being evenly  
21 distributed in the untreated controls is  
22 these mice are moving back and forth all over  
23 the place and if these were highly effective  
24 devices and highly repellant, those mice  
25 would starve. They would not go into that

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1 POTTER  
2 part of the room so I think it's  
3 demonstrating that these things will not be  
4 effective in driving mice out of an area and  
5 keeping them out of an area and that area to  
6 be really effective needs to be the structure  
7 or the residence.  
8 MR. KOPEL: We're going to take  
9 a break.  
10 MR. OSTOJIC: Okay.  
11 (Recess taken.)  
12 Q. Sir, you stated on paragraph 89  
13 of Exhibit 1 of your initial report, "Since  
14 the Bell & Howell pest repellents are marketed  
15 to control existing infestations, they would  
16 need to over power these aggregating odors in  
17 order to 'drive pests out' of buildings."  
18 Did I read that correctly?  
19 A. Correct.  
20 Q. What do you mean by control?  
21 A. What I mean by control is to  
22 eliminate the infestation which would  
23 necessitate driving them out of the areas  
24 where the pests were dwelling and I guess  
25 drive them out and drive them out of the

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1 POTTER  
2 building.  
3 Q. That would be driving them out  
4 of if they are located under the floors or  
5 behind walls, correct?  
6 A. That's the problems with these  
7 devices. These pests live in these cryptic  
8 locations behind and within stuff so somehow  
9 if these pests are going to be driven out of  
10 that dwelling whether it's a single family  
11 home or an apartment or whatever, they will  
12 have to be driven out and I can't figure out  
13 how these devices will accomplish that with  
14 all the inherent limitations they have.  
15 Q. When you say control, you mean  
16 to drive them out of their hiding places be  
17 it behind walls or under the floors, correct?  
18 MR. KOPEL: Objection;  
19 misstates the testimony. You can  
20 answer.  
21 A. Can you repeat the question?  
22 (Record read.)  
23 A. Drive them out from wherever  
24 they are.  
25 Q. That would include behind walls

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1 POTTER  
2 or under floors, correct?  
3 A. Or the pests have moved out of  
4 those areas and it's driving them out of the  
5 exposed areas, but yes, it has to -- the  
6 pests either through driving them out from  
7 the device or the pests coming out on their  
8 own, they have to be driven out of the  
9 location where they are and out of the  
10 structure.  
11 Q. Nowhere in the user manual for  
12 the Bell & Howell devices does it state that  
13 it will control pest infestations, correct?  
14 A. Not in those specific words,  
15 however --  
16 MR. KOPEL: Please let him  
17 finish.  
18 MR. OSTOJIC: We have wasted so  
19 much time. I just want you to answer  
20 my question. I understand you have a  
21 lot to say.  
22 MR. KOPEL: Finish your answer.  
23 A. I don't want my testimony to be  
24 taken out of context. I spent my entire  
25 career, professional career evaluating

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1 POTTER  
2 technologies, working with stakeholder  
3 groups, homeowners, the professional pest  
4 control industry to try to explain to them  
5 how these devices or whatever the technology  
6 works or doesn't and my interpretation of  
7 reading the user instructions and the other  
8 labeling materials that are so stated with  
9 this device is a consumer reading that  
10 material would assume that if they purchased  
11 this device, plug it into an outlet or the  
12 numbers that are required, it would solve  
13 their pest problem and for a consumer, that  
14 means if they have roaches, buy these  
15 devices, put it in, now we don't have  
16 roaches.  
17 Q. There's nothing that you found  
18 in the Bell & Howell user manual that states  
19 that pests located behind walls or under  
20 floors will be driven out; is that fair?  
21 A. It's fair that they don't  
22 specifically say that pests behind walls and  
23 in these hidden locations would be driven  
24 out. It just simply says drive them out and  
25 leaves it to the imagination of a consumer

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1 POTTER  
2 who doesn't understand that these pests are  
3 living in these hidden locations. It has to  
4 drive them out of those places.  
5 Q. Did the user manual for the  
6 Bell & Howell devices you read state that its  
7 effectiveness is decreased if there is a  
8 barrier to the sound waves, fair?  
9 A. Correct.  
10 MR. KOPEL: Can we look at the  
11 document that's being referenced.  
12 A. Is this what I should be  
13 looking at?  
14 Q. Did you review any other Bell &  
15 Howell manual or instructions other than the  
16 one that you are holding?  
17 A. First of all, I didn't look at  
18 the one with the night light, I looked at the  
19 one that we tested, but I believe the  
20 instructions are the same, Bell & Howell  
21 ultrasonic pest repeller. I also went to  
22 Bell&Howell.com and basically anything I  
23 could find, the packaging materials which are  
24 somewhat different in terms of what they say,  
25 there is some caveats and things on those

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1 POTTER  
2 that aren't on this so this is only one, but  
3 of all the things that I looked at, it used  
4 terms like repels, drives them out, don't  
5 need to use messy dangerous sprays, don't  
6 need to pick up dead animals and the  
7 inference in reading all of the literature is  
8 you plug these things in and your pest  
9 problem is solved.  
10 Q. You indicated several times  
11 about real world tests, do you recall that?  
12 A. Correct.  
13 Q. Isn't the real world test what  
14 the consumers have experienced when they  
15 bought the Bell & Howell devices for their  
16 own homes?  
17 A. You have to clarify that  
18 question because I don't understand what  
19 you're saying.  
20 Q. Have you tried to research what  
21 consumers of the Bell & Howell devices  
22 actually experience with the devices when  
23 using them in their homes; have you done any  
24 study like that?  
25 A. No.

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1 POTTER  
2 Q. Have you checked for any  
3 testimonials or anything on the internet  
4 about the comments consumers of the Bell &  
5 Howell devices have concerning the  
6 effectiveness of the Bell & Howell devices?  
7 A. Only what I read in one of the  
8 experts Dr. Borth's report where he did some  
9 analysis of Amazon ratings of the device  
10 online.  
11 Q. Do you know how many consumers  
12 have sought a refund from Bell & Howell with  
13 respect after purchasing the Bell & Howell  
14 devices?  
15 A. No.  
16 Q. Is that important to you?  
17 A. No.  
18 Q. Is it important to you to know  
19 how consumers have reacted with respect to  
20 the Bell & Howell devices when used in the  
21 consumer's homes?  
22 A. It's really not important to me  
23 because like I said, I spent my entire career  
24 talking to and educating homeowners and other  
25 people that have pest problems and they often

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1 POTTER  
2 believe or think that a certain approach is  
3 effective because of the placebo effect and  
4 it's hard to determine what these devices are  
5 actually doing unless you actually evaluate  
6 them in the kinds of control studies that  
7 we've been talking about here today.  
8 Q. You mention in your report  
9 something about an FTC warning, do you recall  
10 that?  
11 A. Yes.  
12 Q. Do you know when that warning  
13 was issued?  
14 A. I would have to go back to my  
15 report. I think it would have been early  
16 eighties. It would have been in the early  
17 2000s, 2001, 2003 or at least a couple of  
18 notifications there. This is paragraph 53 of  
19 my report. There are other mentions of it in  
20 my report, but I would have to dig more.  
21 Here we go, Roger Gold, 1984, he did some of  
22 his cockroach tests at the request of the FTC  
23 and then somewhere in my report it talks  
24 about requiring a number of companies to  
25 either take their products off the market or

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1 POTTER  
2 change their labeling or both and it's in my  
3 report, but I would have to dig it out. If  
4 you want me to, I will.  
5 Q. The FTC warning was before  
6 these Bell & Howell devices were actually  
7 manufactured and sold, correct?  
8 A. I don't recall the date of when  
9 they were manufactured and sold. I know from  
10 reading Ms. Feuerstein's deposition that they  
11 have been selling these devices for a long  
12 time, I guess more recently to Bell & Howell,  
13 but I think they were selling them to other  
14 companies with very similar characteristics  
15 according to her deposition prior to the FTC  
16 ruling to other companies.  
17 Q. Do you know if the FTC ever  
18 issued any warnings, letters of any kind to  
19 Bell & Howell directly?  
20 A. I don't know.  
21 Q. Did the FTC bring actions  
22 against any manufacturers?  
23 A. My recollection is yes, but I'd  
24 have to go through my report.  
25 Q. Do you have any information to

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1 POTTER  
2 indicate that the FTC brought any action  
3 against Bell & Howell?  
4 A. I have no information on that,  
5 no.  
6 Q. If the FTC did bring actions  
7 against the manufacturers, where is that  
8 published?  
9 A. The FTC issued some  
10 announcements about the enforcement actions  
11 that they took and I have to find it in my  
12 reports so give me a minute if you want me  
13 to.  
14 MR. OSTOJIC: What was the  
15 question?  
16 (Record read.)  
17 A. Let me go to my reference  
18 citations. In my reference citations 2001  
19 Federal Trade Commission warns manufacturers  
20 and retailers of ultrasonic pest control  
21 devices and there is a URL cite mentioned in  
22 a press release and there was another one in  
23 2003, marketer of pest control devices  
24 required to provide support for claims.  
25 Again, from recollection there

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1 POTTER  
2 are about 50 or 60 companies that they cited.  
3 Of course there were other investigations  
4 both by FTC and EPA on electromagnetic  
5 devices back around I want to say 1980, but  
6 I'd have to go back and check that.  
7 Q. Sir, are you aware of any order  
8 from any governmental agency be it the FTC or  
9 EPA to Bell & Howell concerning Bell &  
10 Howell' ultrasonic pest repellers?  
11 A. No.  
12 Q. Sir, are you aware of any  
13 recalls from any governmental agency  
14 including the Consumer Product Safety  
15 Commission with respect to the Bell & Howell  
16 devices which are the subject of this case?  
17 A. No.  
18 Q. Sir, are you aware of any state  
19 agency or local agency that's ever commenced  
20 any proceedings against Bell & Howell with  
21 respect to the Bell & Howell devices which  
22 are the subject of this case?  
23 A. No.  
24 Q. I'm going to Exhibit number 2,  
25 your rebuttal report. That's a true and

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1 POTTER  
2 correct copy of your rebuttal report, right?  
3 A. Yes.  
4 Q. It's just rebutting any  
5 opinions that you reviewed with respect to  
6 the reports of Dr. Borth and Dr. Whitford,  
7 right?  
8 A. Correct.  
9 Q. On page 13 you have a  
10 subsection that says plaintiffs' alleged  
11 noncompliance with user instructions is  
12 immaterial?  
13 A. Correct.  
14 Q. What you're saying is it didn't  
15 matter to you what the Bell & Howell user  
16 instructions were when you were conducting  
17 the testing of those devices, fair?  
18 MR. KOPEL: Can you please read  
19 that question back.  
20 (Record read.)  
21 MR. KOPEL: Objection;  
22 misstates prior testimony.  
23 A. I'm going to need to read what  
24 I said underneath this header here. The way  
25 you phrase that question that it was

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1 POTTER  
2 immaterial to the way we conducted our  
3 experiments, I'm specifically referring here  
4 that it was immaterial to the ultimate  
5 performance of the products used by consumers  
6 for many of the reasons I've already talked  
7 about. Cleaning up food which is -- can be  
8 recommended and it can be of some use, but in  
9 and of itself you cannot clean up all the  
10 food so that's not going to resolve the  
11 problem of these devices not performing and  
12 as we talked about obstruction and places  
13 these pests live, does it really matter if  
14 you don't put it behind a couch if the  
15 cockroaches are living in the under side lip  
16 of the kitchen sink protected by wood and a  
17 cabinet so whether the obstruction is at the  
18 point where these critters are or whether  
19 it's next to the device, what's the  
20 difference so bottom line is I don't think  
21 whether they follow the instructions or not  
22 or whether they lost their instructions or  
23 not would have made a nickel's bit of  
24 difference in the performance of these  
25 devices.

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1 POTTER  
2 Q. Is that true for all products,  
3 in other words, it doesn't really matter to  
4 you whether use instructions on any product  
5 is followed to determine the effectiveness of  
6 that product?  
7 A. Absolutely not.  
8 Q. Why is it different with the  
9 Bell & Howell device?  
10 MR. KOPEL: Objection;  
11 misstates prior testimony.  
12 A. It's different because based on  
13 prior literature, evaluating products as I  
14 said with very, very similar physical output  
15 characteristics and from our studies and from  
16 the inherent deficiencies or limitations of  
17 ultrasound as a pest controlling device,  
18 these caveats are immaterial now.  
19 If I don't follow the  
20 instructions on my medication, if you have  
21 taken a blood pressure medication, you darn  
22 well better follow the instructions, but in  
23 this case this is a totally different  
24 situation we are talking about with a device  
25 that would not in my opinion be effective

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1 POTTER  
2 regardless of how these plaintiffs used it.  
3 Q. wouldn't that be true though  
4 with any pest management device if it's not  
5 used in accordance with its instructions,  
6 it's going to either decrease its  
7 effectiveness or eliminate it; isn't it true?  
8 A. If the device is inherently  
9 effective when used properly, these devices  
10 are not effective even when they are used  
11 properly.  
12 Q. But that's different than  
13 saying following the instructions is  
14 meaningless, isn't it?  
15 A. When I said it's immaterial, I  
16 don't think it has relevance to this case  
17 whether these plaintiffs follow the  
18 instructions or not. I didn't read the  
19 depositions, but I'm inferring from some of  
20 the expert reports that in some cases they  
21 may have not read the instructions, but there  
22 was not a lot of clarity in terms of what  
23 they did or didn't do, it was very anecdotal,  
24 but knowing what I know about these devices  
25 and the way they have been evaluated by us

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1 POTTER  
2 and by others and the limitations of these  
3 devices, whether you follow the instructions  
4 or not would be immaterial to this case in  
5 terms of whether they would work or not.  
6 To blame these people for this  
7 device not working because they didn't follow  
8 the instructions in my view is improper and  
9 really not relevant.  
10 Q. Isn't it because -- aren't you  
11 critiquing the Bell & Howell devices because  
12 they don't eliminate pests that may be hidden  
13 behind barriers; isn't that the gist of your  
14 conclusion?  
15 A. Can you repeat the question?  
16 Q. Sure. Isn't the gist of your  
17 opinion on these devices is you critique them  
18 because they don't get rid of pests that may  
19 be behind walls or under floors?  
20 A. No, there's a lot of reasons  
21 why I critique these products and I put that  
22 all into my reports and there is a lot of  
23 limitations of these materials besides the  
24 fact that the pests are hidden. Many of  
25 these pests probably don't even have the

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1 POTTER  
2 ability to detect ultrasound.  
3 Q. why did you then have i2L and  
4 Sierra do any testing if quite frankly you  
5 didn't believe that these devices or the  
6 technology of ultrasonic sound waves work at  
7 all?  
8 A. Because --  
9 MR. KOPEL: I'm going to  
10 caution you not to reveal any  
11 communications with counsel. To the  
12 extent you can answer without doing  
13 so, fine, otherwise don't answer.  
14 A. In reading the documents that I  
15 did early on in this case, there was some  
16 question as to whether previous studies that  
17 were conducted with other products were  
18 relevant to the consideration of how the Bell  
19 & Howell products would perform so I felt it  
20 was necessary to evaluate the specific  
21 products that pertain to this case which Bell  
22 & Howell sells to further demonstrate that  
23 even if those particular products were  
24 evaluated they would be ineffective.  
25 Q. In your rebuttal report you

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1 POTTER  
2 state on page 19 towards the bottom and I  
3 quote, "At best, they" and I assume you are  
4 talking about the Bell & Howell devices "may  
5 temporarily discourage rodents from visiting  
6 areas in buildings that have little cover  
7 available." Did I read that correctly?  
8 A. Yes.  
9 Q. That's your opinion that you  
10 wrote?  
11 A. I need to read it in context of  
12 paragraph 53. I didn't write this. This was  
13 a direct quote out of Dr. Howard and Dr. Rex  
14 Marsh's publication where they concluded that  
15 at best there could be some temporary effect  
16 which the rodents would habituate and adapt  
17 to and again, it would need to be an area  
18 with very little cover so this is a quote and  
19 just for what it's worth, these guys are two  
20 of the icons of -- these are rodentologists  
21 from the University of California Davis. They  
22 did probably 40 years of work on ultrasonic  
23 devices and other types of devices to look at  
24 the effects on rodents so this is a quote  
25 from them, not from me. I'm simply restating

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1 POTTER  
2 what they are stating and I agree with it.  
3 Q. You agree that the Bell &  
4 Howell devices would be effective if there  
5 isn't cover provided for the pests?  
6 MR. KOPEL: Objection;  
7 misstates prior testimony.  
8 A. If there was no cover and those  
9 particular -- there certainly have been some  
10 studies to show -- we know that rodents  
11 detect ultrasound and in some circumstances  
12 when they are exposed to ultrasonic pest  
13 repellers, there is some initial response,  
14 avoidance of the sounds.  
15 Q. That would mean it's effective,  
16 avoidance of the sounds? Doesn't that really  
17 mean repelling, that they are being repelled?  
18 MR. KOPEL: Counsel, please  
19 don't interrupt the witness. You can  
20 finish your answer to the last  
21 question.  
22 A. Can you read back the last  
23 question or the last answer.  
24 MR. KOPEL: Please read the  
25 question and answer.

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1 POTTER  
2 (Record read.)  
3 A. So do you want to rephrase the  
4 question?  
5 MR. OSTOJIC: Read the next  
6 question.  
7 (Record read.)  
8 A. First of all, technically it  
9 doesn't mean they are being repelled, they  
10 are being moved because repellency really has  
11 to be directional based on gradient of a  
12 stimulus. That being said, having worked  
13 with pest problems my entire career and  
14 trying to eliminate them in buildings to have  
15 a temporary avoidance of an ultrasonic device  
16 does not in and of itself means the device is  
17 effective. Effective to me means that you  
18 eliminate those pests from the building so I  
19 think what these authors are conceding here  
20 was that yes, in some circumstances rodents  
21 can be deterred or moved or impacted by  
22 ultrasound, but it's temporary and it is more  
23 likely to occur in structures where there is  
24 little or no cover.  
25 Q. If a pest avoids a room where

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1 POTTER  
2 there is the Bell & Howell ultrasonic device,  
3 does that mean it's being repelled by the  
4 device?  
5 A. I'm sorry, could you repeat the  
6 question.  
7 (Record read.)  
8 MR. KOPEL: Objection;  
9 incomplete hypothetical.  
10 A. No, not necessarily. It could  
11 be avoiding that room for any number of  
12 reasons.  
13 Q. But if a pest avoids a room  
14 because of the ultrasonic sounds from the  
15 Bell & Howell device, would you then agree  
16 with me that the pest is being repelled by  
17 that device?  
18 A. If it could be -- yes, if it  
19 could be determined that the rodent was  
20 responding to the ultrasound and it was  
21 avoiding the sounds, you could say it was  
22 being repelled by the device. I'm really  
23 dealing with semantics --  
24 MR. KOPEL: Please stop  
25 interrupting the witness.

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1 POTTER  
2 A. -- because the word repellency  
3 infers a directed movement of organisms and  
4 quite honestly I don't believe that was  
5 evaluated in these studies and it has  
6 particular relevance to the cockroach study  
7 by Ballard and Gold in 1984 where at no point  
8 did they concede that these cockroaches were  
9 being repelled. They were being -- it  
10 increased their movement and there is a  
11 difference between those two.  
12 Q. Do pests adapt to pesticides?  
13 A. Yes, they do. Could you read  
14 that back?  
15 (Record read.)  
16 A. Yes.  
17 Q. You have new pesticides  
18 continuously, don't you?  
19 A. Yes, for a variety of reasons,  
20 one of which is I think when you say adapt,  
21 you may mean becoming resistant or immune to  
22 the chemical, correct.  
23 Q. Yes so you believe that pests  
24 in this case, the pests enumerated in the  
25 Bell & Howell user manual, that they could

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1 **POTTER**  
2 adapt to the ultrasonic sounds, right?  
3 A. Right.  
4 Q. Isn't that true for all pest  
5 management devices including insecticides and  
6 pesticides?  
7 A. Well, it's not exactly the  
8 same. This adaptation and habituation and  
9 avoidance of ultrasonic sounds has been  
10 demonstrated repeatedly over 50 years of  
11 working with these devices and it typically  
12 occurs quite quickly in a matter of days or  
13 perhaps a week or so. That's not the way --  
14 when you launch a new insecticide, it better  
15 not lose its effectiveness in days or weeks  
16 or that manufacturer will lose a lot of  
17 money.  
18 Q. What's the device called that  
19 has a sticky pad to it where they try to  
20 force either a rodent or insect to get stuck  
21 on the pad and essentially die?  
22 A. Like a glue board.  
23 Q. Are those effective?  
24 A. Against rodents?  
25 Q. Against any pest that they

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1 **POTTER**  
2 claim to be effective against?  
3 A. They can be. They have  
4 limitations. Mature rodents often won't get  
5 caught in a glue board, they avoid them.  
6 Younger rodents less so. They are good for  
7 monitoring from the standpoint of insects so  
8 it depends on the details.  
9 Q. Isn't that true with any  
10 product? Every product has some limitation  
11 to it, doesn't it?  
12 A. Correct.  
13 Q. For instance, those sticky pads  
14 that I refer to, by the way, what's the name  
15 that you call them?  
16 A. Glue board for rodents. We  
17 often call them sticky traps for insects.  
18 Q. The sticky --  
19 A. Glue boards.  
20 Q. The glue boards, they won't  
21 drive pests out from behind walls and under  
22 floors, correct?  
23 A. Correct.  
24 Q. So you have to put them at a  
25 spot where you think the pest will go or at

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1 **POTTER**  
2 least try to lure the pest with food or  
3 something else to bring the pest to that  
4 sticky part, fair?  
5 A. Fair.  
6 Q. With pesticides as well, if you  
7 put pesticide in your drain, that will not  
8 drive pests out of your home, will it?  
9 A. No.  
10 Q. The pesticide has to be used  
11 pursuant to the user instructions to be  
12 effective if at all, correct?  
13 A. Correct, but there is a big  
14 difference between the use of a pesticide or  
15 a repellant device by a lay person, a  
16 homeowner, consumer than a professional and  
17 professionals know how to use these various  
18 devices where consumers are typically quite  
19 naive in terms of what's necessary to make  
20 these devices work or measure the  
21 effectiveness of these devices.  
22 Q. In the pest management world,  
23 what are some of the devices other than the  
24 ultrasonic repellers that are non-lethal if  
25 you know?

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1 **POTTER**  
2 A. The pest control industry does  
3 not use ultrasonic devices, but as far as  
4 other non-lethal devices, they use glue  
5 boards, they use snap traps, they use --  
6 these are lethal to the rodent, but not  
7 lethal -- they are not pesticides; is that  
8 what you're asking?  
9 Q. Yes.  
10 A. There's glue boards.  
11 Q. Those are lethal to the pest,  
12 that's what I mean?  
13 A. Correct.  
14 Q. In the pest management world  
15 other than ultrasonic pest repellers, are  
16 there any non-lethal devices being sold to  
17 the public that you know of?  
18 A. For rodent control?  
19 Q. For pest control?  
20 A. Sure.  
21 Q. What is it?  
22 A. That are non-lethal on the  
23 pests, correct?  
24 Q. Yes.  
25 A. Well, exclusion, sealing up

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|   |  |
|---|--|
| <p>1 POTTER</p> <p>2 openings to deny entry of pests in the</p> <p>3 buildings.</p> <p>4 Q. Really if you use exclusion you</p> <p>5 don't need any other device, wouldn't that be</p> <p>6 fair?</p> <p>7 A. In a perfect world, but it's</p> <p>8 very different to build out all the potential</p> <p>9 entry points.</p> <p>10 Q. I take it that's expensive?</p> <p>11 A. Off the top of my head I cannot</p> <p>12 think of any device that's non-lethal to the</p> <p>13 pest that drives the pest out of the</p> <p>14 building.</p> <p>15 MR. OSTOJIC: I'm going to take</p> <p>16 a two minute break and finish up</p> <p>17 quickly.</p> <p>18 (Recess taken.)</p> <p>19 (Exhibit 5, Document, marked</p> <p>20 for Identification.)</p> <p>21 Q. Doctor, let me show you what we</p> <p>22 marked as Exhibit number 5. Take a look at</p> <p>23 it and tell me if you recognize it?</p> <p>24 A. I do.</p> <p>25 Q. What is it?</p> <p style="text-align: right;">201</p> | <p>1 A C K N O W L E D G M E N T</p> <p>2</p> <p>3 STATE OF )</p> <p>4 :ss</p> <p>5 COUNTY OF )</p> <p>6</p> <p>7 I, DR. MICHAEL POTTER, hereby certify</p> <p>8 that I have read the transcript of my</p> <p>9 testimony taken under oath in my deposition;</p> <p>10 that the transcript is a true, complete and</p> <p>11 correct record of my testimony, and that the</p> <p>12 answers on the record as given by me are true</p> <p>13 and correct.</p> <p>14</p> <p>15</p> <p>16 _____</p> <p>17 DR. MICHAEL POTTER</p> <p>18</p> <p>19</p> <p>20 Signed and subscribed to before me,</p> <p>21 this day of , 2018.</p> <p>22</p> <p>23</p> <p>24 _____</p> <p>25 Notary Public, State of _____</p> <p style="text-align: right;">203</p>  |
| <p>1 POTTER</p> <p>2 A. This was a brief summary of the</p> <p>3 methodology and findings of Dr. Richard</p> <p>4 Mankin's testing.</p> <p>5 Q. Do you disagree with anything</p> <p>6 in Exhibit number 5 written by Dr. Mankin?</p> <p>7 A. No.</p> <p>8 Q. Do you accept Dr. Mankin's</p> <p>9 conclusions that he reached?</p> <p>10 A. Yes.</p> <p>11 Q. You adopted those conclusions</p> <p>12 in your report?</p> <p>13 A. That's correct.</p> <p>14 MR. OSTOJIC: Okay. I don't</p> <p>15 have any further questions. Thank</p> <p>16 you, sir.</p> <p>17 MR. KOPEL: I have no questions</p> <p>18 either. Dr. Potter will reserve the</p> <p>19 right to review the transcript and</p> <p>20 sign and my office will handle</p> <p>21 ordering of any copies.</p> <p>22 (Time noted: 3:20 p.m.)</p> <p>23</p> <p>24</p> <p>25</p> <p style="text-align: right;">202</p>  | <p>1 C E R T I F I C A T E</p> <p>2</p> <p>3 STATE OF NEW YORK )</p> <p>4 ) ss.:</p> <p>5 COUNTY OF NEW YORK )</p> <p>6</p> <p>7 I, SHARI COHEN, a Notary Public</p> <p>8 within and for the State of New York, do</p> <p>9 hereby certify:</p> <p>10 That DR. MICHAEL POTTER, the witness</p> <p>11 whose deposition is hereinbefore set forth, was</p> <p>12 duly sworn by me and that such deposition is a</p> <p>13 true record of the testimony given by such</p> <p>14 witness.</p> <p>15 I further certify that I am not</p> <p>16 related to any of the parties to this action</p> <p>17 by blood or marriage; and that I am in no way</p> <p>18 interested in the outcome of this matter.</p> <p>19 IN WITNESS WHEREOF, I have hereunto</p> <p>20 set my hand this 17th day of January, 2018.</p> <p>21</p> <p>22</p> <p>23</p> <p>24 _____</p> <p>25 SHARI COHEN</p> <p style="text-align: right;">204</p> |



| 1  | 2   | 3  | 4   | 5   | 6   | 7      | 8                         | 9      | A  | accordance   | agreement   | anymore  |
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